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No. 95-237

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SEBASTIAN INTERNATIONAL, INC.,
Petitioner,

v.

LONGS DRUG STORES CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF COSTCO WHOLESALE CORPORATION, THE PRICE COMPANY, AND NATIONAL ASSOCIATION OF CHAIN DRUG STORES IN SUPPORT OF RESPONDENT

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36 pp

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. The Record Lacks Evidence Of Any Lanham Act Violation That Might Conflict With The Ninth Circuit's Application Of The First Sale Rule 6

II. The Ninth Circuit's Application Of The "First Sale" Rule Is Wholly Consistent With This Court's Past Decisions 13

CONCLUSION 17

APPENDICES:

Appendix A – Appellant's Excerpts of Record, *Sebastian International, Inc. v. Longs Drug Stores Corporation*, 9th Cir. No. 94-55461 . . . . . 1a

Appendix B – Members of National Association of Chain Drug Stores 11a

TABLE OF AUTHORITIES

Cases:

Adams v. Burke, 84 U.S. (17 Wall.) 453 (1873) 14

Aloe Creme Lab. v. American Soc. for Aesthetic Plastic Surgery, 192 U.S.P.Q. (BNA) 170 (TTAB 1976) 10

American Speech-Language-Hearing Ass'n v. National Hearing Aid Soc., 224 U.S.P.Q. (BNA) 798 (TTAB 1984) 10

Bill Blass Ltd. v. SAZ Corp., 751 F.2d 152 (3d Cir. 1984) 12

Bloomer v. McQuewan, 55 U.S. (14 How.) 539 (1852) 14

Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908) 14

Cases, continued: Page

Boise Cascade Corp. v. Mississippi Pine Mfrs. Ass'n, 164 U.S.P.Q. (BNA) 364 (TTAB 1969) 11

Champion Spark Plug Co. v. Sanders, 331 U.S. 125 (1947). 15

Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977). 14, 16

Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992) 16

F.R. Lepage Bakery, Inc. v. Roush Bakery Prods. Co., 851 F.2d 351, *modified*, 863 F.2d 43 (Fed. Cir. 1988) 11

Huber Baking Co. v. Stroehmann Bros. Co., 252 F.2d 945 (2d Cir.), *cert. denied*, 358 U.S. 829 (1958). 11

Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700 (Fed. Cir. 1992) 12

Matrix Essentials, Inc. v. Emporium Drug Mart, Inc., 988 F.2d 587 (5th Cir. 1993) 12

Prestonettes, Inc. v. Coty, 264 U.S. 359 (1924). 6, 14, 15

Professional Golfers Ass'n v. Bankers Life & Casualty Co., 514 F.2d 665 (5th Cir. 1975) 9, 11

Quality Courts United, Inc. v. Quality Courts, Inc., 140 F. Supp. 341 (D. Pa. 1956) 10

Schroeder v. Lotito, 577 F. Supp. 708 (D.R.I. 1983), *aff'd*, 747 F.2d 801 (1st Cir. 1984). 9

Sebastian Int'l, Inc. v. Consumer Contacts (PTY), Ltd., 847 F.2d 1093 (3d Cir. 1988) 13

United States v. Univis Lens Co., 316 U.S. 241 (1942) 14

Statutes:

Lanham Act §32(1), 15 U.S.C. §1114(1) 4, 5, 6, 7

Lanham Act §43(a), 15 U.S.C. §1125(a)(1). 4, 5, 6, 7

15 U.S.C. §1127. 9

17 U.S.C. §109(a). 14

Page

Miscellaneous:

S. Rep. No. 1333, 79th Cong., 2d Sess. (1946), *reprinted in* 1946 U.S.C.C.A.N. at 1275 15

Sup. Ct. Rule 10.1(a) 5

Trademark Manual of Examining Procedure §1304.01 (2d ed. May 1993) 10, 12

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INTEREST OF *AMICI CURIAE*

1. Costco Wholesale Corporation ("Costco") and The Price Company ("Price Club")[1] operate "Costco" and "Price Club" membership warehouse clubs across the United States and Canada and in certain other countries

[1] Costco and Price Club are wholly owned subsidiaries of Price/Costco, Inc., whose shares are publicly traded.

and have members from more than 10 million U.S. households. With a low cost structure, Price Club and Costco sell brand-name goods at extremely low prices. These have included genuine goods manufactured by petitioner, Sebastian International, Inc. ("Sebastian"). Sebastian's counsel has sent Costco and Price Club letters claiming that *amici* are infringing the Sebastian collective membership mark by selling genuine Sebastian products to which Sebastian has affixed the mark on the rear panels of the original containers.

2. National Association of Chain Drug Stores ("NACDS") is a national association of retail chain drug store companies. It has 134 members that operate 21,186 retail outlets throughout the United States representing over $60 billion in sales. *See* Appendix B at 11a. NACDS members sell genuine high quality products, including trademarked goods, at low prices.

A reversal of the Ninth Circuit's decision in this case would have far-reaching consequences for NACDS members. It would likely inspire other manufacturers to adopt the same strategy that Sebastian has followed—i.e., creating a "business club" of one's own customers, calling the business club a "collective," affixing a "collective membership mark" somewhere on the package of the manufacturer's products, and then invoking the federal courts to enjoin NACDS members from reselling these genuine products.

3. Consents from petitioner and respondent to file this brief *amici curiae* are being filed separately with the Clerk. Previously, the Ninth Circuit granted Costco, Price Club and NACDS leave to file a brief *amici curiae* before that court.

STATEMENT

This case concerns a manufacturer's use of a "collective membership mark" on a product package in an effort to control the product's distribution, not just by the manufacturer's own customers, but by all resellers in all aftermarkets.

Sebastian places two marks on its products (which are shampoos, conditioners, and other hair care products). First, on the front panel of each package Sebastian puts the principal label and a traditional trademark. Second, on each package's back panel, Sebastian places a collective membership mark that says "Sebastian Collective Salon Member." *See* Appendix A *infra* at 8a.[2]

Sebastian formed a "business club" consisting of those salons and distributors to whom it chooses to sell. Appendix A at 1a. The club's charter says, "This business club will be governed by a Board of Advisors composed exclusively of executives and/or personnel of SEBASTIAN." *Id.* at 2a. This club is the "collective" referred to by the collective membership mark on the back panel of Sebastian products.

Longs Drug Stores Corporation ("Longs Drug" or "Longs") is not a member of Sebastian's business club collective. It purchased genuine Sebastian products on the open market from traders who apparently obtained them from Sebastian's authorized salons or others. Pet. A2. Thus, the products had been previously sold at least twice when Longs purchased them.

Longs made no affirmative use of the collective membership mark. It did not copy it. It did not post any sign

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[2] Since the undeveloped state of the record is a central focus of this brief, *amici* have set out in Appendix A certain portions of the Excerpts of Record on file with the Ninth Circuit.

or publish any ad saying it was a "Sebastian Collective Salon Member." It did not even advertise the products or alter or repackage them. Longs simply placed the Sebastian products on the shelves in its drug stores, along with hundreds of other products it sells.

Sebastian brought suit, claiming that Longs' ordinary commercial acts of stocking and reselling products bearing a collective membership mark created a "likelihood of confusion" in violation of sections 32(1) and 43(a) to the Lanham Act, 15 U.S.C. §§1114(1) and 1125(a).

SUMMARY OF ARGUMENT

The petition asks the Court to consider the relationship between the first sale doctrine and Sebastian's novel use of a collective membership mark on its own label, as a device to control not only its own customers but also downstream resales of its products by others. No other court of appeals has addressed this question. However, the Ninth Circuit's decision—that use of a collective membership mark on a product label confers *no* greater rights beyond the "first sale" than does a trademark—is consistent with administrative practice: The Patent and Trademark Office has ruled that collective membership marks are not for use on goods.

Granting the petition based on the court of appeals' decision below would immerse the Court in an issue that lacks a clear record. Petitioner's "Question Presented" presumes that the record contains "misrepresentations to the public and conduct likely to cause consumer confusion." Pet. i. Yet the record does not show that Longs Drug made any statement that would rise to a misrepresentation or that it engaged in any conduct explicitly or implicitly deceptive. It simply placed

on its store shelves genuine products that happened to bear (on their rear panels) a collective membership mark placed not by Longs Drug but by the original manufacturer.

The sole evidence of "confusion" in the record, a single consumer survey, was challenged on appeal. The record shows that this survey included several leading questions to the interviewees. *See* Appendix A at 7a-9a. The Ninth Circuit did not reach this evidentiary issue before it. Thus, were this Court to take this case, it would find an unsettled record on whether there was any public confusion from Longs' act of placing genuine products on its store shelves.

Accordingly, this case does not present a conflict between the first sale doctrine and a record of "misrepresentations" or "confusion" in violation of sections 32(1) and 42(a) of the Lanham Act. The purported conflict and its importance are hypothetical. Further, because no other court of appeals has yet considered the significance under Lanham Act section 32(1) or 43(a) of a store's selling a product bearing a collective membership mark placed by the manufacturer, there is also no conflict among the circuits (Sup. Ct. Rule 10.1(a)).

Finally, there is no conflict with any past decisions of this Court. Those decisions support application of the first sale doctrine in situations in which the defendant has made a far greater use of the trademark than has Longs here. Although this Court's antitrust jurisprudence has declared that certain resale restrictions on a manufacturer's own customers do not rise to a *per se* violation of the Sherman Act, this Court has never declared that it is procompetitive for a manufacturer to attempt to exercise control, beyond its own customers, over all resellers of its product.

ARGUMENT

I.

THE RECORD LACKS EVIDENCE OF ANY LANHAM ACT VIOLATION THAT MIGHT CONFLICT WITH THE NINTH CIRCUIT'S APPLICATION OF THE FIRST SALE RULE.

Under the Lanham Act, Sebastian could not have enjoined a retailer from reselling its unaltered and genuine products simply because Sebastian's trademark was on the front of those products. *Prestonettes, Inc. v. Coty*, 264 U.S. 359 (1924). Instead, by affixing to the back of its products a collective membership mark, Sebastian seeks to prevent all trade in its products in all aftermarkets. In attempting to accomplish this unprecedented feat, Sebastian relies on a record below that reveals (A) only ordinary commercial conduct by a retailer, (B) evidentiary issues unadjudicated by the court of appeals about whether this ordinary commercial conduct has caused (or could cause) "confusion" under the Lanham Act, (C) a use of a collective membership mark that the Patent and Trademark Office has deemed inappropriate, and (D) a lack of consideration of this use by any other court of appeals. This is hardly a worthy case for certiorari.

A. The central premise of the petition is that the record reveals a clear violation of sections 32(1) and 43(a) of the Lanham Act, with which the Ninth Circuit's application of the "first sale" doctrine purportedly conflicts. Petitioner says there is a conflict with the Lanham Act's "plain language," Pet. 6, which arises from a record that supposedly reveals "misrepresentations to the public and conduct likely to cause consumer confusion," Pet. i. The record, however, does not support this assertion.

Subject to certain limitations, sections 32(1) and 43(a) of the Lanham Act proscribe the "use" of another's mark when such use is "likely to cause confusion, or to cause mistake, or to deceive. . . ." 15 U.S.C. §§1114(1), 1125(a)(1). However, the acts of Longs Drug were not inherently of the type that cause "confusion" or that "deceive." Longs Drug simply put genuine Sebastian products on its shelves and sold them when a customer brought them to the cash register:

> Nothing in the record suggests that Longs did anything more than stock and resell genuine Sebastain products lawfully acquired on the open market under the true Sebastian trademark. . . .

Pet. A7-A8. This ordinary retail transaction falls short of misrepresentation or deceit under the Lanham Act. As the court of appeals below stated:

> When a purchaser resells a trademarked article under the producer's trademark, and nothing more, there is no actionable misrepresentation under the statute.

Pet. A6.

B. Petitioner in the district court attempted to establish "confusion" through other means—a single consumer survey, the reliability of which was challenged (but never adjudicated) on appeal. The challenge to the survey's reliability centered on the use of a window decal. A substantial number of Sebastian's authorized salons display in their store windows a decal bearing the Sebastian collective membership mark. Appendix A at 4a, 6a. Longs Drug, however, never displayed any such decal. Nevertheless, each interview during the consumer survey began as follows:

> . . . The interviewer handed the survey respondent the sign/decal, which might be displayed on the window of a store or shop. . . .
>
> The interviewer than asked the respondent the following questions:
>
> 2a. This is a sign or decal which might be displayed on the window or a store or shop. . . .
>
> 2b. If you saw this sign or decal on a store or shop window, what would you believe it meant?

Appendix A at 7a.

On appeal to the Ninth Circuit, Longs Drug challenged the evidentiary reliability of this survey because the survey invited the interviewees to assume (incorrectly) that Longs Drug placed in its store windows a decal bearing the Sebastian collective membership mark. The Ninth Circuit did not reach this evidentiary question. If this petition were granted, the Court would need to determine whether the survey techniques were reliable and whether the survey adequately supported a finding of "confusion" caused by the mere placing of genuine Sebastian products on Longs' shelves. All of these determinations, not reached by the Ninth Circuit, would be necessary predicates to deciding the question presented in the petition.

C. Granting this petition would embark the Court on yet another undeveloped trail: the meaning and significance of a collective membership mark when placed by a manufacturer on its own products. Although district courts and administrative bodies have addressed similar issues, the Court here would have to find its way without the guidance of a body of decisions from our courts of appeal. The path would be obstructed by the following thorny issues.

Collective marks are divided into two groups: (1) collective trademarks and service marks and (2) collective membership marks.[3] Sebastian registered its mark as a collective membership mark, designated by the letters "CMM." Typically, an establishment uses a collective membership mark on store signs, in windows, on business cards and in the advertisements to publicize the establishment's affiliation with a group or association. *See Schroeder v. Lotito*, 577 F. Supp. 708 (D.R.I. 1983), *aff'd*, 747 F.2d 801 (1st Cir. 1984) (a printer placed in his window a "union" emblem, a collective membership mark, to give the impression that he ran a "union" shop and to influence the public to patronize his shop); *Professional Golfers Ass'n v. Bankers Life & Casualty Co.*, 514 F.2d 665 (5th Cir. 1975) (a golf association's collective mark, "PGA," was used by a private country club as part of its name, thus suggesting affiliation with the PGA).

By contrast, the present case involves a manufacturer that placed a collective membership mark on its own products in the manner of a trademark. The Patent and Trademark Office has taken the position that a collective *membership* mark is not to be used on goods.

> Membership marks are not trademarks or service marks in the ordinary sense; they are not used in business or trade, and they do not indicate commercial origin of goods or services. Registration of these marks fills the need of collective organiza-

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[3] Section 45 of the Lanham Act says: "The term 'collective mark' means a trademark or service mark . . . used by the members of a cooperative, an association, or other collective group or organization . . . *and includes marks indicating membership* in a union, an association, or other organization." 15 U.S.C. §1127 (emphasis added).

> tions *which do not use the symbols of their organizations on goods* or services but which wish to protect their marks to prevent their use by others.

Trademark Manual of Examining Procedure §1304.01 (2d ed. May 1993) (emphasis added).

The Patent and Trademark Offices's Trademark Trial and Appeal Board ("TTAB") has similarly drawn a distinction between collective trademarks and collective service marks, on the one hand, and collective membership marks like the one here, on the other:

> A collective trademark or collective service mark is a mark adopted by a "collective" . . . for use only by its members, who in turn use the mark to identify their goods or services and distinguish them from those of nonmembers. . . . A collective membership mark is a mark adopted for the purpose of indicating membership in an organized collective group, such as a union, an association, or other organization. *Neither the collective nor its members uses the collective membership mark to identify and distinguish goods* or services; rather, the sole function of such a mark is to indicate that the person displaying the mark is a member of the organized collective group.

Aloe Creme Lab. v. American Soc. for Aesthetic Plastic Surgery, 192 U.S.P.Q. (BNA) 170, 173 (TTAB 1976) (emphasis added); *accord American Speech-Language-Hearing Ass'n v. National Hearing Aid Soc.*, 224 U.S.P.Q. (BNA) 798, 806 (TTAB 1984) (invalidating a collective membership mark used to certify the quality of services: "Collective membership marks are not trademarks or service marks in that they do not indicate commercial origin of goods or services"); *cf. Quality Courts United, Inc. v. Quality Courts, Inc.*, 140 F. Supp. 341, 347 (D. Pa. 1956) ("If the mark is used by the organization

itself to identify its own goods or services . . . it is a trademark or service mark.'",[4]

Sebastian did not register a collective trademark, only a collective membership mark.[5] Thus, there is an issue (also unresolved by the court of appeals below) of the legal significance of Sebastian's having placed a *membership* mark on its products. Did it simply signify that the product emanated from a member of the Sebastian collective? If so, the mark was being used as an unregistered collective *trademark.*

Or did the mark signify that whoever might eventually sell the goods was a member of the Sebastian collective? If such a finding were to be made, the Court would have to confront the continuing viability of the Patent and Trademark Office rulings that registration of collective *membership* marks is only available to "collective organizations which do not use the symbols of their organizations on goods. . . ." *Trademark Manual of Examining*

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[4]Other decisions permit an association to use a collective mark to identify the origin of goods, but appear to involve use as a collective trademark rather than as a membership mark. *See Huber Baking Co. v. Stroehmann Bros. Co.*, 252 F.2d 945, 957 (2d Cir.), *cert. denied*, 358 U.S. 829 (1958) (an association's collective mark was placed on bread labels together with a bakery's own name or mark; the court treated both marks as a "trademark"); *F.R. Lepage Bakery, Inc. v. Roush Bakery Prods. Co.*, 851 F.2d 351, *modified*, 863 F.2d 43 (Fed. Cir. 1988) (same). *Cf. Boise Cascade Corp. v. Mississippi Pine Mfrs. Ass'n*, 164 U.S.P.Q. (BNA) 364, 367 (TTAB 1969) (in some circumstances, both a membership mark and a trademark may appear on goods).

[5]While the case was pending before the Ninth Circuit, Sebastian also registered its mark as a collective service mark, but *not* as a collective trademark. Pet. A2 n.1. Even a collective service mark, however, "serves not to identify particular merchandise produced by members. . . ." *Professional Golfers Ass'n*, 514 F.2d at 668.

Procedure §1304.01. Again, the Court would have to address this particular issue without the benefit of any court of appeals decision on point.[6]

D. For this reason also, there is no circuit conflict. The petition suggests there is one, but for one of the purportedly conflicting decisions, the petition candidly admits that there is no conflict in either the holding or the rationale of that decision.

> *Matrix* actually was decided on a different basis than the Ninth Circuit's rationale for applying the first sale doctrine to downstream sales by independent parties.

Pet. 12 (citing *Matrix Essentials, Inc. v. Emporium Drug Mart, Inc.*, 988 F.2d 587 (5th Cir. 1993)).[7]

The court of appeals below identified the basic reason why there is no circuit conflict. Longs Drug simply

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[6] In addition, the Court would have to address a point raised by the concurring opinion in the court of appeals: that Sebastian's collective mark was not validly registered because the application for the mark was not made by the organization itself but only by one of its members. Pet. A10.

[7] A second asserted conflict is not even a trademark case. *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992), concerned a patented medical device that was sold subject to a condition that the purchaser use the device only once. The issue was whether this condition was permitted by the patent owner's "right to exclude" use of an invention under a patent monopoly.

Bill Blass Ltd. v. SAZ Corp., 751 F.2d 152 (3d Cir. 1984), is even more remote. It involved the licensing of a third party, Fischer, to manufacture and sell an trademarked product. The licenses expired. The defendant bought the licensee's assets and agreed "to assume Fischer's obligations under the licenses." *Id.* at 155. Although the expired licenses terminated the right to sell what Fischer had manufactured, the new owner continued selling. No such license or expiration of rights is at issue here.

stocked and resold genuine products purchased in the open market. No court of appeals has ever held (or suggested) that such ordinary commercial conduct could be deemed a Lanham Act violation. As the Ninth Circuit has stated:

> [A] purchaser who does no more than stock, display and resell a producer's product under the producer's trademark violates no right conferred upon the producer by the Lanham Act. . . .

Pet. A6.

In sum, the only thing that is "plain" about the petition is that it does not present a ripe question of circuit conflict or of federal importance. The petition's main premise, that this case presents a conflict between the "plain language" of the Lanham Act and the first sale doctrine, is largely undeveloped in the record. Just to reach the purported conflict with the Lanham Act, this Court would necessarily have to consider a variety of evidentiary and legal issues unresolved by the Ninth Circuit below and undeveloped by other courts of appeals. Plainly, even if the issue purportedly presented by this petition were deemed of federal importance, it should await a clearer factual setting and the more developed legal terrain of a future case.

II.

THE NINTH CIRCUIT'S APPLICATION OF THE "FIRST SALE" RULE IS WHOLLY CONSISTENT WITH THIS COURT'S PAST DECISIONS.

The first sale doctrine "finds its origins in the common law aversion to limiting the alienation of personal property." *Sebastian Int'l, Inc. v. Consumer Contracts (PTY), Ltd.*, 847 F.2d 1093, 1096 (3d Cir. 1988) (applying the

first-sale doctrine to Sebastian's copyrighted labels). The rule is not peculiar to trademark law, but has long been applied by this Court to copyright and patent claims.[8] It permits department stores, pharmacies, general merchandisers and even hair salons to find after-markets for their excess inventories of goods—even though those goods may have patented, copyrighted or trademarked elements.[9]

As the petition acknowledges, this Court first applied the first sale doctrine to trademark law in *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924) ("The defendant . . . by virtue of its ownership, had a right to com-

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[8] Copyright: *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (the rule precludes "restriction on the subsequent alienation of [a copyrighted article] after the [copyright] owner had parted with the title to one who had acquired full dominion over it"); *see* 17 U.S.C. §109(a).

Patent: *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 549 (1852) ("[W]hen the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly."); *Adams v. Burke*, 84 U.S. (17 Wall.) 453, 456 (1873) (upon sale, a patented item "is open to the use of the purchaser without further restriction on account of the monopoly of the patentees"); *United States v. Univis Lens Co.*, 316 U.S. 241, 249 (1942) ("An incident to the purchase of any article, whether patented or unpatented, is the right to use and sell it . . . [and] is a relinquishment of the patent monopoly with respect to the article sold.").

[9] The argument put forward by *amicus curiae* COPIAT in support of the petition is both factually and legally erroneous. First, the Ninth Circuit did not base its decision on "discredited antitrust doctrine," but rather on the well-recognized "first sale" rule. Second, as discussed below, COPIAT's reliance on *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977) is misplaced because that case dealt with restrictions placed on a supplier's own customers. Here, Sebastian attempts to achieve, via use of a collective membership mark, that which it could not achieve through a trademark—i.e., the elimination of competitive activity by downstream resellers who are not under contract with Sebastian.

pound or change what it bought, to divide [it] and to sell it so divided."); *see Champion Spark Plug Co. v. Sanders*, 331 U.S. 125, 129 (1947). The text of the Lanham Act (enacted in 1946) does not disclose any intent to overrule *Prestonettes.* Indeed, the legislative history indicates the contrary:

> Trade-marks are not monopolistic grants like patents and copyrights (Trade-mark cases, 100 U.S. 82). In *Prestonettes v. Coty* (264 U.S. 359), Mr. Justice Holmes said (368):
>
> > It [a trade-mark] does not confer a right to prohibit the use of the word or words. It is not a copyright. * * * A trade-mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his.

S. Rep. No. 1333, 79th Cong., 2d Sess. (1946), *reprinted in* 1946 U.S.C.C.A.N. at 1275.

Petitioner suggests that the decision below conflicts with one of the rationales in *Prestonettes*:

> When the mark is used in a way that does not deceive the public we see no such sanctity in the word as to prevent its being used to tell the truth.

264 U.S. at 368. Of course, as discussed *supra* at 6-7, Longs Drug did nothing deceitful. It simply stocked and resold genuine goods. In fact Longs did less to the goods than did the defendant in *Prestonettes*, who repackaged "Coty" trademarked face powder and perfume and then reproduced the "Coty" name on the package in a factual manner.

Petitioner and its *amicus* also suggest that the decision below conflicts with antitrust principles from this Court's past decisions. Pet. 12; COPIAT Br. 13-15. The authori-

ties cited, however, deal only with the ability of a manufacturer to control the terms of distribution *with its own customers*—not to control downstream resales by persons not under contract with the manufacturer. Thus, in *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977), the Court simply ruled that it was not a *per se* violation of the Sherman Act for a manufacturer contractually to restrict its dealer-customers from selling in the territories of other dealers. This Court has never said that it is procompetitive for a manufacturer also to control the aftermarkets for its products, downstream from its direct customers. *Cf. Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 477 (1992 ("It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets.").

More to the point, Congress never intended the Lanham Act to give registrants of collective membership marks the power to control downstream resales beyond their own dealer networks. As the court of appeals has stated here:

> Nothing in the language or legislative history of the Lanham Act suggests that, by authorizing registration of marks identifying membership in a lodge, political party, club, or other collective organization, Congress intended to provide producers with a simple and fail-safe method to control the channels of distribution of trademarked products. . . . There is no mention of this possibility in committee hearings or reports, on the floor of Congress, or in subsequent case law or commentary.

Pet. A5. Simply put, the decision below does not conflict with the statute, and it does not conflict with past decisions of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 7, 1995

APPENDIX A

APPELLANT'S EXCERPTS OF RECORD ("ER")
Sebastian International Inc. v. Longs Drug Stores Corporation
9th Cir. No. 94-55461

FROM ER 117:

CHARTER

SEBASTIAN AUTHORIZED BUSINESS CLUB

I NAME

The name of this business club is Sebastian Collective Salon Membership Program.

II PURPOSE

The purpose of this business club is to engage in any lawful and proper act or activity (a) to promote the collective welfare of customers of Sebastian International, Inc. ("SEBASTIAN") and its authorized distributors and salons through encouraging and achieving customer education and satisfaction in the selection and use of SEBASTIAN products and the services of its authorized distributors and salons, (b) to directly benefit Sebastian International Inc.'s authorized distributors and salons by achieving deeper market penetration in a highly competitive market, and (c) to combat diversion of Sebastian International Inc.'s products.

III BOARD OF ADVISORS

This business club will be governed by a Board of Advisors comprised exclusively of executives and/or personnel of SEBASTIAN.

* * *

FROM ER 1011-12, 1015:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 93-2891 WDK (EEx)

SEBASTIAN INTERNATIONAL, INC.,
a California corporation,

Plaintiff,

v.

LONGS DRUG STORES CORPORATION,
a Maryland corporation,

Defendant.

DECLARATION OF JOHN J. KUCHINSKI
IN SUPPORT OF PLAINTIFF'S REPLY
IN SUPPORT OF PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION

Date: January 31, 1994
Time: 3:00 p.m.

I, JOHN J. KUCHINSKI, hereby declare as follows:

1. I am Vice President/Legal Affairs of Sebastian International, Inc., the plaintiff in this action, and have been employed by Sebastian for in excess of five (5) years. . . .

* * *

3. The Collective, and all restrictions arising therein, were created independently by Sebastian, without input of any kind from distributors or salons.

* * *

12. Along with the creation of the Collective has come a large number of membership and advertising materials, all displaying the collective membership and service marks, which are available for display inside a member's store, as well as on their store front. It is my understanding that a substantial majority of members have chosen to utilize their window decals to announce their membership to all who pass by the business establishment.

* * *

FROM ER 169-173:

HAIR CARE SURVEY

Purpose of the Survey

The survey was conducted by Cogan Research Group to provide objective evidence of the extent to which there is or is not likelihood of confusion among relevant consumers concerning affiliation of Longs Drug Stores Corporation with Sebastian International Inc. and Sebastian International Inc.'s "Sebastian Collective Salon Membership Program" (the 'Collective').

Research Procedure

A total of 421 in-person interviews were completed with consumers in the relevant market who were surveyed regarding their beliefs about the affiliation of stores or shops and drug stores carrying Sebastian hair care products with Sebastian International Inc. and the Sebastian Collective Salon Membership Program. The relevant market was defined as women 18 years or older, who during the past six months had shopped in a drug store and had purchased hair care products at a drug store or a hair salon or beauty parlor. Only women were interviewed as they are the primary purchasers of these hair care products.

A two step survey procedure was used:

Step One–Qualifying to Be Interviewed

First consumers were "screened" in large shopping center malls to determine whether they qualified for participation in the survey. (Permanent market research interviewing centers which are located in these malls

were retained to "screen" potential survey respondents (participants) according to the "relevant market" requirements, and to conduct the interviews. See the Appendix of this report for copies of the survey screener and questionnaire.

Step Two–Conducting the Interview

In step two those who met the survey qualification requirements were invited individually to accompany the interviewers to the interviewing center in the mall. Each survey respondent was escorted to an interviewing booth and asked to be seated. They were told that they would be shown material and products related to hair care.

First Visual Shown to the Respondent–The Decal/Sign. The interviewer handed the survey respondent the sign/decal, which might be displayed on the window of a store or shop:

See Appendix for a sample of sign/decal and photographs of the product shown survey respondents.

The interviewer than asked the respondent the following questions:

2a. This is a sign or decal which might be displayed on the window of a store or shop. Please read it along with me. "Sebastian Collective Salon Member."

2b. If you saw this sign or decal on a store or shop window, what would you believe it meant? If you have no opinion about this, just say so. (The respondent's answers were recorded verbatim.)

2c. Do you believe the owner or manager of the store or shop which would display this sign would or would not have to get authorization or permission to display it? If you have no opinion about this, just say so.

Have to get authorization or permission (ASK Q.2d)

Not have to get authorization or permission (SKIP TO Q.3a)

Don't know (SKIP TO Q.3a)

No opinion (SKIP TO Q.3a)

2d. What makes you believe the owner or manager of the store or shop would have to get authorization or permission to display it? (The respondent's answers were recorded verbatim.)

2e. Who do you think the owner or manager of the store or shop would have to get authorization or permission from to display it? (The respondent's answers were recorded verbatim.)

THE SIGN/DECAL WAS REMOVED FROM SIGHT

Second Visual Shown to Respondent–Hair Spray Can with "Collective" Rectangle. The interviewer then handed the survey respondent the Sebastian Shaper Plus Hair Spray can which on its back has a rectangle with the same wording and look as the sign/decal:

See Appendix for a sample of sign/decal and photographs of the product shown survey respondents.

The interviewer than asked the respondent the following questions:

3a. Now imagine you are shopping in a drug store which you regularly shop in. You walk into the hair care section of the drug store, see this product on the shelf and pick it up.

If you saw this hair care product on the shelf of the drug store, and saw this (POINT TO RECTANGLE "SEBASTIAN COLLECTIVE SALON MEMBER") what would you believe it meant? If you have no opinion about this, just say so. (The respondent's answers were recorded verbatim.)

3b. If you saw this hair care product on the shelf of a drug store, would you believe the owner or manager of the drug store would or would not have to get authorization or permission to carry it or do you have no opinion about this?

Have to get authorization or permission (ASK Q.3c)

Not have to get authorization or permission (SKIP TO Q.3e)

Don't know (SKIP TO Q.3e)

No opinion (SKIP TO Q.3e)

3c. What makes you believe the owner or manager of the drug store would have to get authorization or permission to carry it? (The respondent's answers were recorded verbatim.)

3d. Who do you think the owner or manager of the drug store would have to get authorization or permission from to carry it? (The respondent's answers were recorded verbatim.)

3e. Would you believe the drug store is or is not affiliated with or associated with the Sebastian Collective Salon program or do you have no opinion about this?

Is affiliated or associated with (ASK Q.3f)

Not affiliated or associated with (SKIP TO Q.4)

Don't know (SKIP TO Q.4)

No opinion (SKIP TO Q.4)

3f. What is it that makes you believe the drug store would be affiliated with or associated with the Sebastian Collective Salon program? (The respondent's answers were recorded verbatim.)

REMOVE DISPLAY ITEM "B", (THE HAIR CARE PRODUCT)

* * *

APPENDIX B

MEMBERS OF NATIONAL ASSOCIATION OF CHAIN DRUG STORES

Albertson's, Inc.
American Drug Stores, Inc.
Andorra Pharmacy Inc.
Arbor Drugs, Inc.
Ark Drugs
The Arrow Corporation/Arrow Prescription Centers
Arthur Drug Stores Inc.
The Bartell Drug Company
Big B, Inc.
Big Bear Stores
Buffalo Pharmacies
CRX Pharmacy
CVS
Carle RX Express
Carrs Quality Centers
City Drug Stores Inc.
City Drugs
Clover Stores
Concord Drugs, Inc.
Corner Drug Stores
D & W Pharmacies, Inc.
Davidson Drugs, Inc.
Discount Drug Mart, Inc.
Downeast Pharmacy, Inc.
Drug Barn Inc.
Drug Emporium, Inc.
Drug Fair Stores of NJ
Drug World Pharmacies
Drugtown Drugstores

Duane Roade
Eckerd Corporation
Emm-Dee Drug Corporation
F & M Distributors, Inc.
Fay's Incorporated
Fedco Professional Pharmacies
Fedco, Inc.
Fred's Inc.
Freedom Drug Inc.
Fruth Pharmacy
Genovese Drug Stores, Inc.
Giant Eagle, Inc.
Giant Food Inc., Pharmacy Div. Giant Discount Drug
Grand Union Company
Gresham Drugs, Inc.
H-E-B Foods/Drugs Inc.
Haggen, Inc.
Happy Harry's Discount Drugs
Harco Drug Inc.
Harmon Discount Stores
Hartig Drug Stores
Health Care Professionals
Hi-School Pharmacy Inc.
Horton and Converse Pharmacies
Hyde Drug, Inc.
I got it at Gary's
Joel N' Jerry's
Judd Drugs, Inc.
K&B Services, Incorporated
Keltsch Bros. Inc.
Kerr Drug Stores, Inc.
Keystone–Medicine Chest Pharmacies
Kinney Drugs, Inc.
Kmart Corporation
Knight Drugs Inc.

Kopp Drug Inc.
Kurtz Pharmacy, Inc.
Lewis Drugs, Inc.
Longs Drug Stores
Marc Glassman Inc.
Marsh Drug Stores, Inc.
Maxi Drug, Inc.
May's Drug Stores, Inc.
McKay Drugs
Med-X Corporation
Medic Discount Drug
Medical Center Pharmacy
Medicap Pharmacies, Inc.
Medicine Shoppe International, Inc.
Medisave Pharmacies
Meijer, Inc.
Monahan Pharmacy Inc.
Navarro Discount Pharmacies
NeighborCare Pharmacies
Nelson's Drug Stores
Northtowne Pharmacy, Inc.
Osborn Drugs, Inc.
Super Save Drugs/Owl Pharmacies, Inc.
Parkway Drugs
Pathmark Stores, Inc.
Pelton's Drug Stores
Perry Drug Stores, Inc.
Phar-Mor, Inc.
Pharmhouse, Corp.
Pic 'N Save Drug Co., Inc.
The Price Company
Price-Less Drug Stores, Inc.
Quick Chek Food & Pharmacy
Reasner Drugs, Inc.
Retire Persons Services, Inc.

Revco D.S., Inc.
Rite Aid Corporation
Ritzman Pharmacies, Inc.
Rock Bottom Stores, Inc.
The Rx Place
Rx Plus
RxD Pharmacies, Inc.
Safeway, Inc.
Sav-On Drugs, Inc.
Save Mart Supermarkets
Seaway Food Town, Inc.
Service Discount Food & Drugs Inc.
Shelly's Pharmacy #1, Inc.
Shop 'N Save Food and Drug Superstores
Shopko Stores, Inc.
Smith's Food and Drug Centers
Smitty's Super Valu, Inc.
Snyder Drug Stores, Inc.
Super D Drugs Inc.
SUPERVALU Pharmacies, Inc.
Target Stores, A Div. of Dayton-Hudson Corp.
Taylor Drug Stores, Inc.
Thrift Drug, Inc.
Thriftway Drugs
Thrifty PayLess, Inc.
Thirify Drug Stores, Inc. dba Thrifty White Drug, Inc.
Thrifty Drugs of Hawaii
Valco Drug Stores
The Vons Companies, Inc.
Wakefern Food Corp./ShopRite
Wal-Mart Stores, Inc.
Walgreen Co.
Weatherwax Drug Stores
White Shield, Inc.
L. F. Widmann, Inc.